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Supreme Court, U.S.
FILED

CASE NO: 97 1165 NOV 10 1997

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IN THE

United States Supreme Court

October, 1997 Term

IVAN D. JONES, JR.,

Petitioner,

vs.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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51 pp

QUESTIONS PRESENTED

1. Does the Maloney Act of 1938 permit the Securities and Exchange Commission to impose double administrative sanctions upon securities professionals already so punished by the Commission's disciplinary arm, the National Association of Securities Dealers?

2. Does the principle of res judicata permit the Securities and Exchange Commission to bring a separate proceeding against a securities professional after the Commission has countenanced a sanction for the same conduct imposed by its disciplinary arm, the National Association of Securities Dealers ?

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OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

The opinion of the United States Court of Appeals for the Fourth Circuit is published and is reported at 115 F.3d 1173 (4th Cir. 1997). The judgment of the Securities and Exchange Commission has not been reported by either official or unofficial reporters. A copy is reprinted in the following Appendix at A-1.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Fourth Circuit was rendered on June 16, 1997. The Fourth Circuit denied petitioner's timely petition for rehearing and suggestion for rehearing *en banc* on August 12, 1997.

This Court has jurisdiction to review the decision of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254.

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STATEMENT OF THE CASE

Petitioner Ivan D. Jones, Jr. has been a licensed stockbroker for 27 years. He has never had a customer complaint. In 1988, Mr. Jones fulfilled a life-long dream by purchasing his own investment firm. By 1990, Mr. Jones' new business had become so successful that Fortune Magazine cited it as one of the nation's top five money managers for small investors.

In the early 1990s, the National Association of Securities Dealers conducted an audit of Mr. Jones' firm. The audit led to the NASD filing three complaints against Mr. Jones and his firm for alleged violations of various provisions of the Securities Exchange Act, SEC rules and NASD rules. The NASD and Mr. Jones resolved these complaints on October 9, 1992. On that date, the NASD issued, and Mr. Jones agreed to, a sanction that included: (1) a censure; (2) a suspension for three business days; (3) a requirement of requalification as a General Securities Principal; and (4) a fine of $22,500.

Because the NASD's decision was the culmination of an agreement between the NASD and himself, Mr. Jones expressly waived his right to appeal that decision to the SEC pursuant to 15 U.S.C. § 78s(d). Nor did the SEC undertake to review the NASD's decision upon the Commission's "own motion," as was its right under the same statute. Indeed, Mr. Jones understood that, by settling with the NASD, he was resolving the matter permanently:

> Q. Did you have any reason to believe when you filed the responses that the SEC would be filing a complaint against you at that time?

A. As a matter of fact, our attorney said that that would close the case, and we would not hear any further.

[Tr. 1622][1]

Instead, the SEC launched its own investigation. Ultimately, the Commission concluded that Mr. Jones violated section 10(b) of the Exchange Act and SEC Rules 10b-5 and 10b-9, as well as aided and abetted violations of sections 15(b), 15(c) and 17(a) of the Exchange Act, and SEC Rules 15b3-1, Rule 15c2-4, Rule 15c3-1, 17a-3, 17a-5, and 17a-11. (A-9, A-10, A-15, A-22) The SEC also found that Mr. Jones violated section 17(a) of the Securities Act of 1933 and aided and abetted violations of certain provisions of the Advisers Act. (A-9, A-14)

The facts upon which the SEC based its findings were virtually identical with those underlying the NASD proceeding. Indeed, the Commission's decision forthrightly acknowledged that the NASD's sanctions were "based on substantially the same allegations as those in the instant proceeding." (A-23, n. 36)

Although Mr. Jones had already fulfilled the NASD's sanctions, the SEC imposed new, and harsher, penalties: (1) suspending Mr. Jones from any association with a broker-dealer or investment adviser for twelve months, and (2) barring him thereafter from any such association in a

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[1] "Tr. __" refers to the transcript of the evidentiary hearing before an Administrative Law Judge in this matter. That judge's initial decision was appealed to the full Commission, which entered the decision appearing below at A-1.

proprietary, supervisory, or managerial capacity, with a right to apply to become so associated after eighteen months. (A-25, A-26)

Pursuant to 15 U.S.C. § 78y(a)(1), Mr. Jones filed with the United States Court of Appeals for the Fourth Circuit a timely Petition for Review of the SEC's decision. Mr. Jones' petition challenged the SEC's decision on the grounds that the SEC's additional sanctions violated the statutory scheme of regulation Congress devised for the securities markets in the Maloney Act. 15 U.S.C. § 78o-3(a). Mr. Jones' petition also argued that the SEC's actions were barred by the principle of *res judicata* and by the Double Jeopardy Clause.

A panel of the Fourth Circuit denied Mr. Jones' Petition for Review in a written opinion on June 16, 1997 and affirmed the SEC's sanctions. Mr. Jones filed a Petition for Rehearing and Suggestion for Rehearing *En Banc* on July 30, 1997. The Court denied that petition on August 12, 1997.

REASONS FOR GRANTING THE WRIT

Mr. Jones' petition presents substantial questions of federal law. The petition seeks review of the SEC's self-professed power to impose additional administrative sanctions on securities professionals already so punished by the NASD -- sanctions which violate the clear terms of the Maloney Act and principles of *res judicata*. Resolution of this question of first impression will have a far ranging impact on the securities markets.

I. JONES' PETITION FOR CERTIORARI PRESENTS A SUBSTANTIAL QUESTION OF FEDERAL LAW REGARDING THE SEC'S ABILITY TO IMPOSE A SECOND PUNISHMENT UPON A BROKER/DEALER ALREADY DISCIPLINED BY THE COMMISSION'S SURROGATE, THE NASD.

A. The Fourth Circuit's Decision to Permit Separate Punishments by the SEC and the NASD for the Same Conduct is Inconsistent with the Maloney Act.

Congress created the SEC to be the primary government agency enforcing the federal securities laws. Four years after passage of the Securities Exchange Act of 1934, Congress amended the Exchange Act to authorize "national securities associations" to enforce those laws under the SEC's supervision. 15 U.S.C. § 78o-3(a). Through this 1938 legislation, known as the "Maloney Act," the NASD was born. See Jones v. SEC, 115 F.3d 1173, 1178-79 (4th Cir. 1997); Harwell v. Growth Programs, Inc., 315 F. Supp. 1184, 1188 (W.D. Tex. 1970), reversed on other grounds, 451 F.2d 240 (5th Cir. 1971), cert. denied, 409 U.S. 876, 93 S. Ct. 126, 34 L. Ed. 2d 129 (1972) (NASD is "effectively a Congressionally-created regulatory organization").

Congress authorized the NASD's creation to avoid "a pronounced expansion of the organization of the Securities and Exchange Commission; the multiplication of branch offices; a large increase in the expenditure of public funds; an increase in the problem of avoiding the evils of bureaucracy; and a minute, detailed, and rigid regulation of business

conduct by law." S. Rep. No. 1455, 75th Cong., 3rd Sess. at 3 (1938); Jones, 115 F.3d at 1178-79. Senator Maloney further explained:

> Congress has undertaken to provide a mechanism whereby the securities business of the country may deal with all problems of technical regulation, leaving to the Securities and Exchange Commission what is hoped will be the residual position of policing the submarginal fringe which recognizes no sanctions save those of the criminal law and of dealing with those problems of regulation with which the industry, as organized under the act, finds itself unsuited or unable to deal.

Report of the Special Study of Securities Markets of the Securities and Exchange Commission, H.R.Doc. No. 93, 88th Cong., 1st Sess., pt. 4, at 606 (1963).

Recognizing the fact that the NASD wields the SEC's disciplinary power, federal courts have identified the NASD as the Commission's disciplinary "agent or arm." Bruan, Gordon & Co. v. Hellmers, 502 F. Supp. 897, 903 (S.D.N.Y. 1980) ("the court is willing to characterize NASD as an agent or arm of the SEC with respect to the conduct of disciplinary proceedings"); Mandelbaum v. NYMEX, 894 F. Supp. 676, 679 (S.D.N.Y. 1995) ("NASD disciplinary officers serve as surrogates for the SEC"); Austin Municipal Securities v. NASD, 757 F.2d 676, 690-91 (5th Cir. 1985) (same). In the words of one federal judge: "As the SEC's 'handmaiden,' [the NASD's action] must be considered a 'valid exercise of the rightful authority of the Government.'" Harwell, 315 F. Supp. at 1191.

The SEC exercises "broad powers of review over virtually every phase" of the NASD's activities:

> The Commission can veto the promulgation of any new rule or amendment to an old rule proposed by the association if the Commission finds the rule inconsistent with the Act, 15 U.S.C. § 78o-3(j)(1964); moreover, the Commission has the power to abrogate any association rule if it finds that abolishing the rule would effectuate the purposes of the Act, 15 U.S.C. § 78o3(k)(1)(1964); and indeed, with respect to some matters, the Commission can effectively command the association to adopt a specific rule, 15 U.S.C. § 78o3(k)(2)(1964). Finally the Commission has plenary review powers over any disciplinary action taken by the association. 15 U.S.C. § 78o3(g)(h)(1964).

Harwell, 315 F. Supp. at 1188; see Jones, 115 F.3d at 1179. Not only are NASD disciplinary decisions directly appealed to the SEC, but the Commission has the power to review them on its "own motion." 15 U.S.C. § 78s(d)(2); Jones, 115 F.3d at 1179.

While the SEC may affirm, modify, reduce, or cancel the NASD's penalty, it may not increase it. "[N]o provision is made for the SEC, on review of an association's disciplinary order, to increase the sanction." Jones, 115 F.3d at 1179; 6 Louis Loss & Joel Seligman, Securities Regulation 2746 n. 220 (3d ed. 1990). Even when the SEC reviews an NASD disciplinary decision on the Commission's own motion, it is

barred from exacerbating the NASD's sanction. 15 U.S.C. § 78s(d) and (e). In the SEC's words: "This Commission is not authorized by statute . . . to increase the sanctions imposed by that body [the NASD]." In re Mason, Moran & Co., 35 S.E.C. 84 n. 25 (1953).

However, the SEC need not accept an NASD sanction the Commission considers overly lenient. The Maloney Act provides that the SEC may reject the sanction and remand the matter to the NASD for further proceedings. 15 U.S.C. § 78s(e). Or, ostensibly, the Commission could set aside the NASD decision, open its own investigation, and impose a different sanction in lieu of the NASD sanction.

Until the Fourth Circuit's decision below, no federal court had ever authorized the SEC to both approve an NASD sanction and impose an additional sanction. In fact, courts had left the issue unresolved:

> It makes no difference that plaintiffs choose to believe the Commission is bent ultimately upon punishing them some more for the misbehavior found by the NASD. The Commission has not announced this objective, and has instituted no proceeding in which further sanctions could be imposed. This is not to say that the Commission is necessarily barred from such a course if it should determine that further adjudicatory proceedings may be justified. It is only to say that it is too early to say.

Thomson & McKinnon v. SEC, 268 F. Supp. 11, 15 (S.D.N.Y. 1967) (refusing to enjoin SEC investigation). The

Fourth Circuit thus recognized that its decision was a case of "first impression." Jones, 115 F.3d at 1177.

The Fourth Circuit's decision has given the SEC powers far beyond its statutory authority. In enacting the Maloney Act, Congress could hardly have contemplated that the SEC would adopt a practice of implicitly approving NASD sanctions and then imposing additional sanctions of its own. That would be more extreme than merely increasing the NASD sanctions -- a procedure flatly prohibited by the Act.

Indeed, the incentive created by the Fourth Circuit's opinion runs directly counter to the purpose of the Maloney Act. Now, no securities professional can ever regard an NASD decision as final. Brokers and dealers sanctioned by the NASD will have little choice but to automatically appeal such decisions to the SEC. The SEC's docket will thus become crowded with cases involving problems of "technical regulation" instead of the "submarginal fringe" envisioned by the Maloney Act. Under the decision below, the Maloney Act, aimed at "avoiding the evils of [expanded SEC] bureaucracy," instead will have added a new, unnecessary, layer.

B. The SEC is Barred by the Principle of Res Judicata from Imposing a Sanction in Addition to that Imposed by the Commission's Delegate, the NASD.

The common law doctrine of res judicata is binding upon two representatives of the federal government. "There is privity between officers of the same government so that a

judgment in a suit between a party and a representative of the United States is res judicata in relitigation of the same issue between that party and another officer of the government." Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 60 S. Ct. 907, 84 L. Ed. 1263 (1940); Kutzik v. Young, 730 F.2d 149, 152 (4th Cir. 1984) ("officers of the same government, who have authority to act on behalf of the government, are in privity").

Therefore, when two federal agencies bring administrative proceedings against the same party, the second agency must accord res judicata effect to the decision of the first. "[T]he reason for applying res judicata to administrative agencies is not only to 'enforce repose' but also to protect a successful party from being vexed with needlessly duplicitous proceedings." Safir v. Gibson, 432 F.2d 137, 143 (2nd Cir.), cert. denied, 400 U.S. 942, 91 S. Ct. 241, 27 L. Ed. 2d 246 (1970). As Judge Friendly explained:

> [I]t would be quite unseemly for the Maritime Administration to conclude that its sister agency had been wrong on a fully litigated issue the decision of which Congress had confided to it. Any objection on the ground that two different statutes are involved is more than overcome in this case by the point that when Congress enacted § 810, the administration of subsidies was entrusted to the same agency, the United States Maritime Commission, that was to enforce the Shipping Act. The 1936 Congress would hardly have expected that after the USMC had found that rates were unjustly discriminatory and unfair while wearing its Shipping Act hat, it would

> reexamine that conclusion on assuming its hat under the Merchant Marine Act, 1936.

Id. Similarly, the 1938 Congress could hardly have expected the SEC to implicitly approve an NASD disciplinary decision while wearing its appellate hat, yet open a separate investigation and impose additional and significantly harsher punishment under its enforcement hat. Indeed, the SEC and NASD's affiliation is even closer than the sibling relationship of the Maritime Administration and the Federal Maritime Commission. See Bruan, Gordon & Co. v. Hellmers, 502 F. Supp. 897, 903 (S.D.N.Y. 1980) (NASD is "an agent or arm of the SEC with respect to the conduct of disciplinary proceedings").

The Fourth Circuit rejected the applicability of *res judicata* on the ground that the NASD and SEC proceedings against Jones were not identical. Jones, 115 F.3d at 1177. That court based its decision on the theory that the two proceedings varied in the degree and type of punishment available.

The Fourth Circuit's reasoning was fallacious -- and its mistake could affect all who operate businesses within the securities markets. Although the punishments that could be meted out by the NASD and the SEC were different, the statutes and regulations allegedly violated were largely identical. Indeed, the Commission's decision forthrightly acknowledged that the NASD's sanctions were "based on substantially the same allegations as those in the instant proceeding." (App-23, n.36)

Moreover, while the precise technical nature of the punishments available to the SEC and the NASD may vary,

their effect is the same. Both entities have the power to impose fines and suspensions -- however they are phrased -- sufficient to shut down a broker/dealer.

Despite the Fourth Circuit's efforts to compare the SEC's double administrative punishment to cases involving criminal and civil remedies, cases involving private parties and the government, or baseball players being fined both by their team and the Commissioner, such analogies are inapposite. Mr. Jones does not assert that the NASD proceeding immunized him against prosecution by the Justice Department, class action civil suits by his customers, or administrative proceedings by state regulators. He merely objects to being administratively punished cumulatively by two wings of a single federal agency. In no other realm of Anglo-American jurisprudence -- save the decision below -- can a person can be held doubly liable, for the same conduct, to the same plaintiff.

The Fourth Circuit's failure to apply the principles of *res judicata* to two proceedings by the same federal agency raises an important issue of federal law.

CONCLUSION

For the forgoing reasons, this Court should grant the writ and reverse the decision below.

Respectfully submitted, this the 10th day of November, 1997.

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SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 36355 / October 10, 1995

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 1530 / October 10, 1995

Admin. Proc. File No. 3-8037

In the Matter of

IVAN D. JONES, JR.
608 Coburn Street
Wrightsville Beach, North Carolina

ROY P. AKERS
1864 Monte Carlo Way
Coral Springs, Florida

OPINION OF THE COMMISSION

BROKER-DEALER AND INVESTMENT ADVISER PROCEEDINGS

Grounds for Remedial Action

Fraud in Sale of Securities and Partnership Interests

Failure to Comply with Net Capital,
Recordkeeping and Reporting Requirements

Where officer of broker-dealer and of investment adviser violated antifraud provisions in connection with offerings of securities and partnership interests, and aided and abetted broker-dealer's violations of net capital provisions, and where officer and president of broker-dealer aided and abetted broker-dealer's violations of recordkeeping and reporting provisions, held, in the public interest to sustain sanctions imposed on officer by administrative law judge, and to suspend president for one year from association with a broker-dealer in a proprietary, supervisory, or managerial capacity and impose a cease and desist order.

APPEARANCES:

John T. Benjamin, Jr., for Ivan D. Jones, Jr.

Peter J. Anderson and Sara Anne Ford, of Sutherland, Asbill & Brennan, for Roy P. Akers.

Joseph L. Grant and Richard P. Murphy, for the Division of Enforcement.

Appeal filed: March 8, 1994
Briefing completed: July 20, 1994
Oral argument: June 14, 1995

I. INTRODUCTION

Ivan D. Jones, Jr. and Roy P. Akers appeal from the initial decision of an administrative law judge. Jones was an officer of both Akers and Jones Securities, Inc. ("AJS" or "the firm"), a registered broker-dealer later known as Jones & Ward Securities, Inc. [1] and Investment/Timing Systems, Inc. ("ITS"), a registered investment adviser. Akers was president of AJS from about April 1989 to June 1990. The law judge found that, during the period April 1989 through April 1990, Jones and Akers violated antifraud provisions in connection with an offering of the securities of Sidbury Land Company, and Jones aided and abetted ITS's violations of Investment Advisers Act ("Advisers Act") antifraud provisions in connection with an offering of general partnership interests in One Virginia Partners ("OVP"). The law judge also found that, during the period from about April 1989 through June 1991, respondents aided and abetted AJS's violations of net capital, recordkeeping, and reporting provisions. [2]

The law judge concluded that Jones should be suspended from any association with a broker-dealer or

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[1] The firm's name was not changed to Jones & Ward until January 1991, after Akers' departure and most of the violative conduct at issue. Accordingly, this opinion will refer to the firm as AJS.

[2] AJS and ITS, both of which were respondents in this proceeding, did not appeal from the law judge's decision. Accordingly, the decision became final as to them. Jones & Ward Securities, Inc., Securities Exchange Act Release No. 33753 (March 10, 1994), 56 SEC Docket 690.

investment adviser for 12 months, and Akers from any association with a broker-dealer for 4 months. He barred respondents from such associations thereafter in a proprietary, supervisory, or managerial capacity, with a right to apply to become so associated after 18 months. In addition, he ordered Jones and Akers to cease and desist from committing or causing any further violations of the provisions they were found to have violated. Our findings are abased on an independent review of the record except to the extent that the findings below are not challenged on appeal.

II. BACKGROUND

Beginning in 1986, Jones conducted an investment advisory business through ITS, a firm that provided a timing service for mutual fund clients and made recommendations of securities and other investments.[3] In 1988, Jones became a one-fourth owner of Trask, Hunt, Hunt, Jones, Ltd. ("THHJ"), a company that was formed to invest in real estate. Jones and his associates decided to acquire a broker-dealer that could market real estate syndications. As a first step, Beacon Investment Group, Inc., a holding company, was formed in January 1989 with Jones as president. Beacon then acquired the stock of Channel Marker Securities, Inc., a registered broker-dealer, from Joseph Daley, and also acquired the stock of ITS. In May 1989, Channel Marker's name was changed to AJS.

In February 1989, Jones informed the National Association of Securities Dealers, Inc. ("NASD") that he

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[3] Jones is president of ITS.

would be the brokerage firm's "control person" who would handle all management responsibilities, and he became the firm's president. Although Jones originally planned to hire Akers just as a salesman, he later decided to have Akers assist him in running the firm.[4] Akers assumed the office of AJS president in April 1989. However, Jones, who became AJS's executive vice president, remained firmly in control of the firm's affairs. Frustrated by his lack of control and being left "out of the loop," Akers resigned as president in July 1990. He was not informed that he had already been removed from office by a vote of the firm's directors, including Jones, in June.[5] Jones then reassumed the office of president.

The plans of Jones and his THHJ associates to market real estate syndications moved forward in March 1989. During that month, THHJ acquired an unimproved tract of land near a major highway, and Sidbury was organized to purchase the property from THHJ with funds to be raised through a securities offering. That same month, THHJ also acquired an office building and adjacent land. In April, OVP was formed to raise the necessary funds to acquire this property from THHJ through the sale of general partnership interests.

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[4] Akers signed a one-year employment contract with Beacon for a specified salary. The agreement provided that, if Akers produced less than 75% of the business specified in the agreement in any given month, Beacon could terminate his employment.

[5] Akers remained with AJS as a salesman until December 1990.

III. THE SIDBURY OFFERING

Beginning in April 1989, AJS was underwriter of an offering, pursuant to Regulation D under the Securities Act, of 38,400 shares of Sidbury common stock at $10.00 per share. The offering circular, drafted by Jones together with attorney Leslie McDaniel, provided that the offering was to be made on a "part-or-none" basis. Unless $192,000 (sales proceeds for half the offering) was raised by August 10, subscribers' funds were to be returned with interest. Sales proceeds were to be escrowed with a named bank until $192,000 was accumulated.

Contrary to the representations in the Sidbury offering circular, Jones opened a checking account for the offering proceeds rather than a bank-controlled escrow account; withdrew some $32,000 from the account before the requisite $192,000 was on deposit; [6] and, instead of refunding subscribers' money, extended the offering beyond the 120-day limit although, because of his withdrawals, $192,000 was not on deposit by the date specified in the offering circular.

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[6] Jones disbursed $9,600 of the funds to AJS for underwriting commissions, $13,460 to THHJ for various fees and expenses incident to the Sidbury offering, and $9,350 to a bank for interest due on the loan THHJ had obtained to purchase the Sidbury property. Although Jones claims that the bank unilaterally withdrew the interest, he admitted at the hearing that it was he who determined the withdrawals that were made from the Sidbury checking account.

Jones does not deny that he took these actions. Instead, he claims that he reasonably relied on the advice of McDaniel. However, McDaniel disputed Jones' claim. According to McDaniel, he advised Jones that the escrow account specified in the offering circular must be a bank-controlled account established pursuant to written agreement;[7] that he never told Jones that he could break escrow when subscription agreements were received for half the offering (as Jones claims), but that $192,000 in cash had to be raised and held in safekeeping; [8] and that, if the necessary funds were not on deposit by the cutoff date, the offering could not be extended. Instead, as McDaniel told Jones, subscribers' money would have to be refunded and Jones would have to"restart from scratch."

In late May 1989, about a month after the Sidbury offering began, it started to get "a little sticky." Accordingly, Jones determined to enhance the offering's attractiveness by giving investors the right to have their shares repurchased at any time by THHJ at the offering price, on 60 days' written notice.[9] The record establishes that the offer was not made

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[7] McDaniel stated that Jones wanted the escrow account since "investors would feel more secure." Although, as Jones points out, Rule 15c-2-4 under the Securities Exchange Act did not require a bank-controlled escrow account for the Sidbury proceeds, such an account was mandated by the Sidbury offering circular.

[8] The record indicates that Jones withdrew Sidbury proceeds even before he had subscription agreements for $192,000 of Sidbury stock.

[9] In addition to letters with a THHJ letterhead, the repurchase offer was made to investors in letters with AJS and ITS

to all investors. Indeed, Jones admitted as much. Moreover, Jones once again ignored McDaniels' advice that, although he could repurchase stock from investors after the offering, there could not be any prior arrangement or guarantee of repurchase.[10] Jones admitted that THHJ did not have enough assets to honor the repurchase agreements. At best, it had an informal line of credit with a bank, and the ability of investors to get refunds depended on whether the bank would lend THHJ the money.[11] No disclosure of THHJ's financial situation was made to investors who were offered the repurchase guarantee.

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letterheads that made no reference to THHJ. Jones insists, however, that THHJ was the intended guarantor.

[10] As our Division of Enforcement contends, sales to persons who were given guarantees against loss were not bona fide transactions for purposes of meeting the Sidbury part-or-none minimum sales requirement. See Securities Exchange Act Release No. 11532 (July 11, 1975), 7 SEC Docket 403-303. However, the law judge made no such finding, and the Division did not appeal his failure to do so. Thus the issue is not properly before us. See Rule 17(b) of our Rules of Practice.

[11] The record does not support Jones' claim that THHJ had a $1 million bank line of credit. Jones seeks to introduce into evidence a THHJ corporate resolution authorizing its officers to obtain bank loans from the United Carolina Bank up to $1,000,000. However, the resolution does not establish that THHJ could actually obtain any such loan. Moreover, Jones has not shown, as required by Rule 21(d) of our Rules of Practice, that there were reasonable grounds for failing to adduce this evidence below. Accordingly, the resolution is excluded from the record.

Jones contends that, since more than $192,000 was received in the Sidbury offering by the August deadline, the part-or-none condition was satisfied even though his earlier withdrawal of funds resulted in less than the requisite amount being on deposit by that date. He further argues that he did not act with scienter since he reasonably relied on the advice of McDaniel, whose testimony to the contrary should not be credited.

One of the primary purposes of a part-or-none offering is to ensure that, by the designated date, the issuer will receive that portion of the total projected offering proceeds deemed essential to enable it to proceed toward its stated objectives.[12] It would hardly accord with that purpose if the part-or-none condition were deemed satisfied although the underwriter had misappropriated all or part of the offering proceeds. We think it clear that Jones acted with scienter. The law judge, who heard the witnesses and observed their demeanor, determined to credit the testimony of McDaniel with respect to the advice he gave Jones. We see no reason to disagree with that assessment. Jones disregarded the terms of the offering circular that he himself helped to draft, and ignored the advice of counsel. Under the circumstances, we conclude that he deliberately defrauded investors in Sidbury.

Accordingly, we find that Jones willfully violated Section 17(a) of the Securities Act and Section 10(b) of the Securities Exchange Act ("Exchange Act") and Rules 10b-5

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[12] Cf. Svalberg v. SEC, 876 F.2d 181, 183 (D.C. Cir. 1989) ("The all-or-nothing provision serves . . . to ensure that the issuing firm has sufficient funds to complete its project. . .")

and 10b-9 thereunder.[13] Jones also willfully aided and abetted AJS's violations of Section 15(c)(2) of the Exchange Act and Rule 15c2-4 thereunder, [14] and, by reason of the fact that he offered and sold Sidbury stock to ITS clients on behalf of ITS, willfully aided and abetted ITS's violations of Sections 206(1) and 206(2) of the Advisers Act.[15]

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[13] Rule 10b-9 prohibits representations that a security is being offered on a part-or-none basis unless the offering is made on condition that the consideration paid will be promptly refunded unless the total amount due the seller is received by the seller by the specified date.

[14] Contrary to Jones's contention, the fact that Rule 15c2-4 does not require a formal escrow account did not relieve him of liability. Rule 15c2-4 makes it a fraudulent practice for a broker-dealer participating in a part-or-none distribution to withdraw investors' funds before the stated contingency has occurred.

[15] The law judge also found that Akers violated the above antifraud provisions (except those of the Advisors Act) in connection with the fraud on Sidbury investors. However, although the law judge explicitly found that Jones acted with scienter, he made no such finding with respect to Akers. On the contrary, he cited Akers' "negligent" participation in the Sidbury fraud. Since a finding of scienter is necessary to establish violations of several of the provisions at issue, and our staff did not appeal from the initial decision, the findings that Akers violated those provisions cannot stand. As for the remaining findings of fraud against Akers, based on our review of the record we are unable to conclude that they are warranted. Akers had only a peripheral involvement in the Sidbury offering. He was not a party to Jones's fraudulent

IV. THE OVP OFFERING

In April 1989, ITS began offering investors general partnership interests in OVP. Seven partnership interests were offered at $70,000 each. The partnership agreement, which was utilized as a selling tool, and other offering materials specified that OVP's purpose was to acquire and manage the office building referred to above from THHJ and, if practical, to acquire property adjacent thereto. The agreement further specified that, apart from normal daily operations, all partnership actions required the consent of 2/3 of the partners, and that investors' funds received prior to April 28, 1989, would be held in escrow.

Jones did not set up the escrow account required by the OVP partnership agreement. And, although that agreement and other offering materials made it clear that the offering's sole purpose was raising funds to acquire a specific office building, Jones diverted OVP offering proceeds for other purposes. Thus he loaned $25,000 of OVP proceeds to THHJ to enable it to purchase an option on a real estate development known as Parkshore Estates. He loaned an additional $20,000 of OVP's money to AJS. Contrary to Jones's assertions, he did not obtain the required consent of 2/3 of OVP's partners for any of these actions.

Jones argues that the OVP partnership interests were not securities and, therefore, not subject to the securities laws. He further asserts that, in any event, the OVP

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actions, and Jones did not keep him informed of what Jones was doing.

partnership agreement authorized other real estate investments in addition to the specified office building.

The charges with respect to OVP involve alleged violations of only Advisers Act antifraud provisions.[16] Those provisions cover all fraudulent conduct by investment advisers affecting clients or prospective clients whether or not that conduct involves securities.[17] Jones' construction of the partnership agreement is clearly erroneous. He points to the agreement's preamble which recites that "the parties hereto desire to acquire and operate real property." However the body of the agreement makes it abundantly clear that the property referred to is the office building to be acquired from THHJ. We note, moreover, that Jones' diversion of OVP funds did not involve "the acquisition and operation of real property."

Jones further contends that the did not act with scienter since he relied on counsel Robert Singer, who assertedly told him that he could invest OVP proceeds in other real estate ventures. He also points out that he repaid or arranged for the repayment of monies diverted from OVP, and that OVP's partners subsequently ratified his actions.

Jones' claimed reliance on Singer does not aid him. Although Jones testified that Singer advised him that an escrow account was not necessary for OVP proceeds, Singer denied that he gave Jones any such advice. Moreover, while Singer did state that investing OVP money in something

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[16] Sections 206(1) and 206(2).

[17] See Abrahamson v. Fleschner, 568 F.2d 862, 877 (2d Cir. 1977), cert. denied, 423 U.S. 913 (1978).

other than the specific real estate described in the partnership agreement was probably permissible under "a broad reading" of that document, he told Jones that, nevertheless, it was "a bad idea . . . because the partnership hadn't been formed for that . . . purpose."[18] Once again, Jones chose to disregard the terms of the offering materials and the advice of counsel. We think it clear that he acted with scienter.

The fact that Jones subsequently repaid or arranged for the repayment of monies improperly taken from OVP does not excuse his actions. Nor does the fact that several years later, after that repayment and during the course of the hearings herein, Jones was able to get statements from OVP partners purportedly ratifying his prior actions.[19]

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[18] Even if Singer had given his unqualified approval of Jones' diversion of funds, it would clearly have been unreasonable for Jones to have relied on such advice. See, e.g., Pittsburgh Terminal Corp. v. Baltimore & Ohio Railroad Company, 680 F.2d 933, 942-943 (3rd Cir. 1982), cert denied, 459 U.S. 1056 (1982); Mitchell v. Pidcock, 299 F.2d 281, 287 (5th Cir. 1962). We note that Jones does not claim that Singer advised him that he could dispense with the necessity of obtaining the consent of 2/3 of OVP's partners for his actions.

[19] See Wilshire Discount Securities, Inc., 51 S.E.C. 547, 551 n.15 (1993). The identical written statements that Jones obtained from OVP partners, which were presumably prepared by Jones, do not refer to Jones' diversion of OVP money to AJS. They recite the benefits to OVP that supposedly resulted from Jones' loans to THHJ and Southeastern and the purchase of Sidbury stock, and note that the money diverted for those purposes was repaid.

We conclude that Jones willfully aided and abetted ITS' violations of Sections 206(1) and 206(2) of the Advisers Act.

V. NET CAPITAL VIOLATIONS IN 1989

As of month-end dates from April through July 1989, AJS operated with net capital deficiencies ranging from $4,021 to $10,210. During that period, broker-dealers were generally required to maintain net capital of at least $25,000. An exception to the rule permitted brokers to have minimum net capital of only $5,000 if, among other things, they did not hold customer funds or securities, or owe money or securities to customers.[20] So-called "$5,000 broker-dealers" could participate in a part-or-none offering if the proceeds were held by an independent escrow agent.[21]

AJS was operating as a $5,000 broker-dealer. However, Jones' failure to place the Sidbury offering proceeds with an independent escrow agent caused the firm's required net capital to increase from $5,000 to $25,000, and resulted in the above net capital violations from April through July 1989.

Jones contends that he did not willfully aid and abet the firm's 1989 net capital violations. He asserts that he thought that he had set up a valid Sidbury escrow account, and McDaniels did not advise him to the contrary. He

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[20] Rule 15c3-1(a)(2) under the Exchange Act as then in effect.

[21] Rule 15c3-1(a)(2)(ii)

further asserts that Akers, and not Jones, was responsible for net capital compliance during the period in question.

As set forth above, Jones deliberately ignored counsel's advice that he set up a bank-controlled escrow account for the Sidbury proceeds. Thus, he was clearly responsible for the resulting net capital violations and cannot place the blame on Akers. We accordingly find that Jones willfully aided and abetted AJS's violations of Section 15(c)(3) of the Exchange Act and Rule 15c3-1 thereunder on the indicated dates.[22]

VI. OTHER BACK OFFICE INFRACTIONS

Shortly after Beacon acquired Channel Marker in January 1989, the NASD closed the firm down pending NASD approval of its reopening. Although the firm's records were admittedly in a shambles, Jones falsely represented to the NASD that he had reviewed the books and records and found them accurate and current. On March 15, 1989, based in part on Jones' representation, the NASD permitted the firm to reopen for business.

Neither Jones nor Akers had the requisite experience to run the firm's back office. At the NASD pre-licensing meeting on March 15, 1989, Akers was told that the firm must have a financial and operations principal ("FINOP")[23]

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[22] Since Akers was not aware that Jones had not established a valid Sidbury escrow account, we do not find him responsible for these violations.

[23] The FINOP is responsible for matters within the purview of the firm's back office, including financial reports, net

within 90 days, and he agreed to qualify for that position. However, he never did so. Instead, he sought a waiver of the FINOP requirement. Although the NASD denied that request on July 19, 1989, the firm did not have a FINOP until Jones qualified for that position in June 1991, nearly two years later.

Akers conceded that, when he arrived on the scene, the firm's records were "a disaster." However, AJS commenced operations with a back office consisting of two untrained and inexperienced clerks. The preparation of financial reports and the maintenance of books and records were left to Norman Efting, an outside accountant who visited the firm monthly. Efting had no experience in broker-dealer accounting, and Akers quickly determined that Efting did not know how to prepare trial balances and net capital computations. He told Jones that they had to get someone else. Jones admitted that Efting had no experience in preparing broker-dealer books and records, and Efting himself told Jones that he was "uncomfortable" and "frustrated" doing it. Yet Jones did not replace Efting with someone qualified.

By August 1989, after an all-day meeting at which Akers "attempted to gain control of the areas for which [he] was responsible," Jones took over responsibility for the firm's back office and agreed to qualify as FINOP. However, as noted, he did not do so until June 1991. Akers was

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capital, maintenance of the firm's books and records, and all matters "involving the [firm's] financial and operational management." Part II(2)(b) of Schedule C to the NASD's By-Laws.

relegated to "the marketing effort on the sales side of AJS." Nevertheless, as president, he retained responsibility for back office compliance since it is clear that he never made a reasonable delegation of his authority.[24]

An NASD examination of the firm in December 1989 disclosed that the firm's records were still in such a shambles that the NASD examiner was unable to make an accurate net capital computation. According to the examiner, when he questioned Jones and Akers about the situation, they indicated that they were not responsible since this was not their area of expertise, and told the examiner to speak to Efting about any problems. In early 1990, the firm's auditors performing the firm's 1989 audit confirmed the NASD's findings of multiple problems with AJS's books and records. In fact, the auditors had to create a completely new set of books. They also questioned Efting's competence, and told Jones and Akers that the firm should have a daily, ongoing, computerized recordkeeping system in place, and that AJS required the services of an internal person who had an understanding of accounting. However, when the auditors conducted the firm's 1990 audit in early 1991, they discovered that, despite their prior admonitions, their suggestions had been ignored. The firm's records were still substantially deficient; the firm was operating with a net

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[24] See, e.g., Thomas F. White, 51 S.E.C. 1194, 1197 (1994) ("The president of a corporate broker-dealer is responsible for compliance with all of the requirements imposed on his firm unless and until he reasonably delegates particular functions to another person in that firm, and neither knows nor has reason to know that such person's performance is deficient.")

capital deficiency; and there was little difference between the situation in 1989 and that during 1990.

In January 1991, Jones finally replaced Efting with a certified public accountant, William Formy-Duval, to run the firm's back office. However, Formy-Duval did not qualify as a FINOP until 1992. In June 1991, he told an NASD examiner that the firm's books and records had been in disarray when he joined the firm, and that they "hadn't gotten things worked out yet."

As might be expected from the foregoing, AJS committed numerous violations of recordkeeping and reporting provisions during the relevant period, and additional net capital violations. Respondents do not challenge the law judge's findings with respect to the firm's violations, and those findings are amply supported by the record. Accordingly, we find as follows:

A. Recordkeeping Violations

From April 1989 through March 1991, AJS failed to comply with recordkeeping requirements. The firm did not maintain accurate and current blotters itemizing all purchases, sales, receipts and deliveries of securities, receipts and disbursements of cash, and all other debits and credits.[25] It also did not maintain ledgers or other records reflecting all assets and liabilities, income and expense and capital accounts.[26] In addition, AJS did not set up ledger accounts for Sidbury investors. Nor did it set up appropriate customer

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[25] Rule 17a-3(a)(1) under the Exchange Act.
[26] Rule 17a-3(a)(2).

ledger accounts when in 1990 it began handling mutual fund trades for customers by wire transfer.[27] Moreover, AJS did not maintain copies of confirmations of mutual fund wire transactions,[28] and its monthly trial balances were inaccurate.[29]

B. Reporting Violations

(1) AJS failed to file quarterly financial reports with this Commission for the quarters beginning April 1, 1989 and ending December 31, 1990. In addition, the firm failed to file its 1989 annual financial report, and filed its 1990 report late.[30]

(2) In December 1989, an NASD examiner informed Jones and Akers of the firm's April-July net capital deficiencies, and told them to give the required telegraphic notice to regulatory authorities. Jones and Akers disagreed with the examiner's conclusions and refused to accede to his request. Thus the firm did not give the requisite notice. Nor did it send the required telegraphic notice of the

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[27] Rule 17a-3(a)(3).

[28] Rule 17a-3(a)(8).

[29] Rule 17a-3(a)(11). The law judge found that Jones aided and abetted all of ASJ's recordkeeping violations, and Akers, those from April through July 1989.

[30] Rule 17a-5. The law judge found that Jones aided and abetted the firm's 1989 and 1990 violations, and Akers, those occurring in 1989.

recordkeeping deficiencies of which Jones and Akers were informed at that time.[31]

(3) AJS did not promptly amend its application for broker-dealer registration on file with this Commission (i) when it changed its name from Channel Marker to AJS, Akers became the firm's president, and Jones resigned as president and became vice president; (ii) when Akers resigned as president and Jones reassumed that office, and (iii) when AJS's name was changed to Jones & Ward.[32]

C. Additional Net Capital Violations

As of month-end dates from December 1990 through February 1991, and April through June 1991, AJS operated with net capital deficiencies ranging from $8,125 to $63,747. On March 7, 1991, AJS operated with a $36,058 capital deficiency.[33]

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[31] Rule 17a-11. The law judge found that Jones and Akers aided and abetted these violations. As we previously held (Whiteside & Company, Inc., 49 S.E.C. 963, 965-966 (1988)), and the rule now requires, if a broker-dealer is informed by its designated examining authority or this Commission that it is, or has been, in violation of net capital requirements, the broker-dealer, even if it disagrees, must give the required notice of the deficiency, which notice may state its disagreement and specify the reasons therefor.

[32] Rule 15b3-1 under the Exchange Act. The law judge found that Jones aided and abetted all of these violations, and Akers, those that occurred in 1989.

[33] The law judge found that Jones aided and abetted these violations.

Aside from the failure to give telegraphic notice of AJS's 1989 net capital deficiencies, Akers denies that he aided and abetted any of the firm's violations. He asserts that Jones was responsible for managing AJS on a day-to-day basis, and that he (Akers) had only limited involvement in back office matters.

Jones argues that he did not commit any willful violations of back office provisions, stating that the firm's infractions were unintentional and that he took steps to remedy them. In addition, he seeks to place most of the blame on others. Thus, he faults McDaniel for failing to audit Channel Marker's books, and Daley for turning those records over late and in poor condition. He further claims "mismanagement" on the part of Akers, and faults the NASD for its "burdensome" requests for information. Jones concedes that he was responsible for violations that occurred after Akers' departure as president.

The record shows that both Akers and Jones abdicated their back office responsibilities. Akers was admittedly aware from the outset that the position of president entailed responsibility for the firm's financial operations, recordkeeping, and other back office functions. However, he was not qualified to fulfill that responsibility, did not seek to become so qualified, and soon learned that he would not be allowed to get the assistance he needed. Yet, when thwarted by Jones in his efforts to improve the firm's situation, he did not resign as president. Instead, he surrendered control of the firm's back office and allowed the status quo to continue. That he could not do. Once he accepted the title as president, Akers was required to fulfill

the obligations attached to that office for as long as he occupied the position.[34]

Akers knowingly failed to carry out his responsibilities as president. By his actions, he rendered substantial assistance to violations by the firm of recordkeeping and reporting provisions.

Jones' claim that his actions were not "willful" or intentional does not aid him. It is not necessary that a respondent intend to violate the law in order to find his actions "willful." It is sufficient if a respondent commits the act that constitutes the violation or, if charged with a duty to act, fails to meet his responsibilities.[35] Jones cannot shift the blame for the firm's violations to others. He misrepresented the status of the firm's books and records to the NASD, ignored the recommendations of Akers and the firm's auditors, and, after assuming full control of the firm's back office, disregarded his responsibilities. The reforms he has assertedly instituted after the period at issue cannot cure his prior derelictions.

We find that, during the respective periods and in the manner noted above, Akers and Jones willfully aided and abetted AJS's violations of Sections 15(b) and 17(a) of the Exchange Act and Rules 15b3-1, 17a-3, 17a-5 and 17a-11 thereunder. We further find that, during the period December 1990 through June 1991, Jones willfully aided and abetted AJS's violations of Section 15(c)(3) of the Exchange Act and Rule 15c3-1 thereunder.

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[34] See Kirk A. Knapp, 50 S.E.C. 858, 864 (1992).

[35] Frank W. Humpherys, 48 S.E.C. 161, [illegible] (1985).

VII. PUBLIC INTEREST

Jones argues that any sanctions against him are unjustified. He asserts that we abused our discretion in bringing this action since no public investors were harmed or complained, there is not present threat of any future harm, and all he ever did was protect and try to make money for his clients. He further states, among other things, that he repaid with interest the money lost on two OVP investments, that he has already been sanctioned by the NASD, [36] that none of his violations was intentional, and that new controls and procedures have been implemented to prevent any recurrence. Finally, Jones claims that he relied on counsel at all relevant times, and has already suffered massive losses as a result of these and related proceedings. Akers argues that his conduct does not justify the four-month total suspension imposed by the law judge, and that he has been punished enough by the sanctions that the NASD assessed for the same violations.[37]

Jones engaged in egregious misconduct. Far from relying on the advice of counsel, he deliberately disregarded

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[36] In October 1992, in proceedings based on substantially the same allegations as those in the instant proceeding, the NASD, pursuant to an offer of settlement, censured Jones, suspended him for 3 business days, required him to requalify as a general securities principal, and fined him $22,500, jointly and severally with the firm. Also pursuant to an offer of settlement, the NASD censured Akers, fined him $5,000 and required him to requalify as a general securities principal.

[37] See n 36, supra

the advice of attorneys, auditors, and regulators to suit his own purposes. Based on the record before us, we consider that, contrary to his assertions, he poses a distinct threat to public investors. Thus we consider the sanctions assessed by the law judge necessary in the public interest. To the extent that Jones raises legitimate mitigative factors, the law judge has already taken them into account.

We have not sustained the law judge's findings of fraud and net capital violations against Akers. However, his failure to fulfill his responsibilities resulted in serious back office infractions. Under all circumstances, we consider that a one-year suspension of Akers from association with a broker-dealer in a proprietary, supervisory or managerial capacity, coupled with an appropriate cease and desist order, will adequately serve the public interest.

As appropriate order will issue.[38]

By the Commission (Chairman LEVITT and Commissioner WALLMAN).

Jonathan G. Katz
Secretary

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[38] All of the arguments advanced by the parties have been considered. They are rejected or sustained to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 36355 / October 10, 1995

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 1530 / October 10, 1995

Admin. Proc. File No. 3-8037

In the Matter of

IVAN D. JONES, JR.
608 Coburn Street
Wrightsville Beach, North Carolina

ROY P. AKERS
1864 Monte Carlo Way
Coral Springs, Florida

ORDER IMPOSING REMEDIAL SANCTIONS

On the basis of the Commission's opinion issued this day, it is

ORDERED that Ivan D. Jones, Jr. be, and he hereby is, suspended from any association with a broker-dealer or investment adviser for a period of twelve (12) months, and

barred thereafter from any such association in a proprietary, supervisory, or managerial capacity, with a right to apply to become so associated after eighteen (18) months; and it is further

ORDERED that Roy P. Akers be, and he hereby is, suspended from association with a broker or dealer in a proprietary, supervisory, or managerial capacity for a period of one year; and it is further

ORDERED that Jones and Akers cease and desist from committing or causing any further violations of the provisions they were found to have violated; and it is further

ORDERED that the suspensions of Jones and Akers shall be effective at the opening of business on October 18, 1995.

By the Commission.

Jonathan G. Katz
Secretary

15 U.S.C. § 78o-3(a)
Registered securities associations

(a) Registration; application. An association of brokers and dealers may be registered as a national securities association pursuant to subsection (b), or as an affiliated securities association pursuant to subsection (d), under the terms and conditions hereinafter provided in this section and in accordance with the provisions of section 19(a) of this title [15 USCS § 78s(a)], by filing with the Commission an application for registration in such form as the Commission, by rule, may prescribe containing the rules of the association and such other information and documents as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78s(d)

Notice of disciplinary action taken by self-regulatory organization against a member or participant; review of action by appropriate regulatory agency; procedure.

(1) If any self-regulatory organization imposes any final disciplinary sanction on any member thereof or participant therein, denies membership or participation to any applicant, or prohibits or limits any person in respect to access to services offered by such organization or member thereof or if any self-regulatory organization (other than a registered clearing agency) imposes any final disciplinary sanction on any person associated with a member or bars any person from becoming associated with a member, the self-regulatory organization shall promptly file notice thereof with the appropriate regulatory agency for the self-regulatory organization and (if other than the appropriate regulatory agency for the self-regulatory organization) the appropriate regulatory agency for such member, participant, applicant, or other person. The notice shall be in such form and contain such information as the appropriate regulatory agency for the self-regulatory organization, by rule, may prescribe as necessary or appropriate in furtherance of the purposes of this title.

(2) Any action with respect to which a self-regulatory organization is required by paragraph (1) of this subsection to file notice shall be subject to review by the appropriate regulatory agency for such member, participant, applicant, or other person, on its own motion, or upon application by any person aggrieved thereby filed within thirty days after the date such notice was filed with such appropriate regulatory

agency and received by such aggrieved person, or within such longer period as such appropriate regulatory agency may determine. Application to such appropriate regulatory agency for review, or the institution of review by such appropriate regulatory agency on its own motion, shall not operate as a stay of such action unless such appropriate regulatory agency otherwise orders, summarily or after notice and opportunity for hearing on the question of a stay (which hearing may consist solely of the submission of affidavits or presentation of oral arguments). Each appropriate regulatory agency shall establish for appropriate cases an expedited procedure for consideration and determination of the question of a stay.

15 U.S.C. § 78s(e)

(e) Disposition of review; cancellation, reduction, or remission of sanction.

(1) In any proceeding to review a final disciplinary sanction imposed by a self-regulatory organization on a member thereof or participant therein or a person associated with such a member, after notice and opportunity for hearing (which hearing may consist solely of consideration of the record before the self-regulatory organization and opportunity for the presentation of supporting reasons to affirm, modify, or set aside the sanction)--

(A) if the appropriate regulatory agency for such member, participant, or person associated with a member finds that such member, participant, or person associated with a member has engaged in such acts or practices, or has omitted such acts, as the self-regulatory organization has found him to have engaged in or omitted, that such acts or practices, or omissions to act, are in violation of such provisions of this title, the rules or regulations thereunder, the rules of the self-regulatory organization, or, in the case of a registered securities association, the rules of the Municipal Securities Rulemaking Board as have been specified in the determination of the self-regulatory organization, and that such provisions are, and were applied in a manner, consistent with the purposes of this title, such appropriate regulatory agency, by order, shall so declare and, as appropriate, affirm the sanction imposed by the self-regulatory organization, modify the sanction in accordance with paragraph (2) of this subsection, or remand to the self-regulatory organization for further proceedings; or

(B) if such appropriate regulatory agency does not make any such finding it shall, by order, set aside the sanction imposed by the self-regulatory organization and, if appropriate, remand to the self-regulatory organization for further proceedings.

(2) If the appropriate regulatory agency for a member, participant, or person associated with a member, having due regard for the public interest and the protection of investors, finds after a proceeding in accordance with paragraph (1) of this subsection that a sanction imposed by a self-regulatory organization upon such member, participant, or person associated with a member imposes any burden on competition not necessary or appropriate in furtherance of the purposes of this title or is excessive or oppressive, the appropriate regulatory agency may cancel, reduce, or require the remission of such sanction.